WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DAVID ROSE, *Applicant*

vs.

COUNTY OF SAN BERNARDINO, Permissibly Self-Insured; CITY OF SAN BERNARDINO, Permissibly Self-Insured, *Defendants*

Adjudication Number: ADJ12857750
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

In order to further study the factual and legal issues in this matter, on September 20, 2022, we granted defendant County of San Bernardino (County) and applicant's separate Petitions for Reconsideration with regard to a workers' compensation administrative law judge's Findings, Award and Orders of July 21, 2022. In the WCJ's decision it was found that, while employed by the County during a Labor Code section 5500.5 liability period from December 17, 2018 to December 17, 2019 as a firefighter, applicant sustained cumulative industrial injury in the forms of prostate cancer, sexual dysfunction, and "hypertensive heart disease," causing permanent disability of 79%. In finding compensable permanent disability of 79%, the WCJ applied Labor Code section 4663 apportionment to applicant's sexual dysfunction disability and to his hypertension disability.

Defendant County contends in its Petition that, with regard to the injury in the form of prostate cancer and the consequent sexual dysfunction disability, the WCJ erred in finding a Labor Code section 5500.5 liability period ending on December 17, 2019, arguing that the "last date on which the employee was employed in an occupation exposing him … to the hazards of the occupational disease or cumulative injury" predated his employment with the County, and that his last injurious exposure was during his prior employment with the City of San Bernardino (City).

Applicant contends in his Petition that the WCJ erred in finding permanent disability of only 79%, arguing that the sexual dysfunction impairment and of the hypertension impairment are exempt from Labor Code section 4663 apportionment by virtue of Labor Code section 4663(e).

Applicant and City have filed answers to County's Petition. We have not received an answer to applicant's Petition. The WCJ has filed separate Reports and Recommendations on Petitions for Reconsideration addressing the respective Petitions.

As explained below, with regard to County's Petition, we will affirm the WCJ's findings. With regard to applicant's Petition, we will amend the WCJ's decision to defer the issue of permanent disability and attorneys' fees pending further development of the medical record and legal analysis.

With regard to County's Petition, Labor Code section 5500.5(a) states in pertinent part, "liability for occupational disease or cumulative injury … shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him … to the hazards of the occupational disease or cumulative injury, whichever occurs first." Applicant worked as a firefighter for City from 1987 through June 30, 2016, and for County from July 1, 2016 through December 17, 2019. It was found that the last date of injurious exposure was December 17, 2019.[1]

County argues that the last date of injurious exposure, at least with regard to the prostate cancer injury, predated applicant's employment with County. In advancing its argument, County quotes qualified medical evaluator urologist Ernest H. Agatstein, M.D., who opines that "it is very likely [that applicant had prostate cancer before starting work for County] based on the fact that in 2019, he already had aggressive prostate cancer that was invading the seminal vesicles and more than likely, this was present for at least five years in my opinion." (June 19, 2020 report at p. 16.)

However, Dr. Agatstein reported that "There may have been some aggravation of his prostate cancer by exposures to more carcinogens while working at the County of San Bernardino from July 1, 2016 until [the last date of injurious exposure]." (June 19, 2020 report at p. 16.) At his deposition, in response to a question regarding whether applicant's work at the County aggravated applicant's prostate cancer, Dr. Agatstein testified:

> I think there was some – yeah, I think you do have to factor in potential contribution of the various hazardous materials that he had been exposed to with

[1] The WCJ found that applicant's Labor Code section 5412 date of injury, defined as when applicant first sustained disability and knew or should have known that the disability was industrial, was December 18, 2019. County does not take issue with this finding.

> the county as well. Yes, you have to factor that in as well, because prostate cancer can start in a very low aggressive form.
>
> And then as I quoted, one of the articles, that later on through methylation, the last article that I quoted on page 18 [of the June 19, 2020 report], I state the exact molecular relationship between latent and clinical cancer. That means there's more occult, nonaggressive cancer versus significant clinical cancer. Is it not known, but – and it's likely that progression from latent to clinical evidence is a continuum with overlap based with mutation, down regulations of methylation, all implicated.

(September 29, 2020 deposition at pp. 10-11.)

Later in the deposition, Dr. Agatstein reiterated that "it's medically probable that there was contribution by his employment at the County of San Bernardino." (September 29, 2020 deposition at p. 25.)

Thus, applicant continued to have hazardous exposure, for the purposes of Labor Code section 5500.5 through his employment at County. *City of South San Francisco v. Workers' Comp. Appeals Bd. (Johnson)* (2018) 20 Cal.App.5th 881 [83 Cal.Comp.Cases 451], cited by County, is inapposite. In *Johnson*, the Court of Appeal explained:

> As noted ante, section 5500.5 provides that liability for a cumulative injury is limited to those employers who employed the employee during one year preceding the earlier of (1) the date of injury per section 5412 … or (2) "the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury." (§ 5500.5(a).) Although the second phrase appears to refer to any exposure to the hazards during a period of employment, this court has held that other provisions in the workers' compensation statutory scheme require proof of proximate causation before liability may be imposed. (*Scott Co. v. Workers' Comp. Appeals Bd. (Stanley)* (1983) 139 Cal.App.3d 98, 104–105 [48 Cal.Comp.Cases 65], citing §§ 3600, subd. (c), 3208, 3208.1.) Thus, an employer is not liable under section 5500.5(a) absent evidence that exposure during that employment was a contributing cause of the disease or injury, i.e., that the exposure was *injurious*. (*Scott Co.*, at pp. 101, 104.)

(*Johnson*, 20 Cal.App.5th at p. 892.)

Here, as explained by Dr. Agatstein, applicant's exposure during his work with County was injurious. Accordingly, the WCJ correctly determined the liability period. We therefore affirm the WCJ's findings with regard to County's Petition.

Turning to applicant's Petition, applicant's first contention is that the WCJ erred in apportioning the sexual dysfunction disability. Applicant argues that the sexual dysfunction disability was caused by the presumptive Labor Code section 3212.1 prostate cancer injury, and thus is exempt from apportionment pursuant to Labor Code section 4663(e). In the Report and Recommendation, the WCJ writes, "If the court relied on Labor Code Section 4660.1, the sexual dysfunction would not be added as an additional impairment, but this WCJ notes that the erectile dysfunction worsened after the surgery for the presumptively compensable prostate cancer as Dr. Agatstein found in this report dated 8/26/21, parties' joint exhibit X1." Labor Code section 4660.1(c)(1) states, in pertinent part, that for injuries after January 1, 2013, "the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase."

Before determining whether apportionment of the sexual dysfunction impairment is permissible, the WCJ must explain the applicability or inapplicability in this case of section 4660.1(c)(1). The WCJ did not explain in her Opinion on Decision or Report why she did not "rely" (to use her term) on section 4660.1. We note that applicant has cited *City of Los Angeles v. Workers' Comp. Appeals Bd. (Montenegro)* 81 Cal.Comp.Cases 611 (writ den.) for the proposition that sexual dysfunction permanent disability is compensable in this case. We believe that the WCJ should analyze this issue in the first instance, allowing for the parties to be heard on this issue. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) We express no opinion on the resolution of this matter. To the extent the WCJ determines that sexual dysfunction permanent disability is permissible in this case, the parties may re-raise any contention regarding the availability of apportionment, including the applicability of Labor Code section 4663(e) to any sexual dysfunction disability. We also express no opinion on the ultimate resolution of this issue.

Applicant's second contention is that the hypertension permanent disability should not have been apportioned because applicant's disability qualifies as presumptive "heart trouble" pursuant to Labor Code section 3212, and is thus exempt from apportionment pursuant to Labor Code section 4663(e). Section 3212 states, in pertinent part, "In the case of members of … fire departments … the term 'injury' includes … heart trouble that develops or manifests itself during a period while the member is in the service of the … department…. The compensation that is

awarded for the … heart trouble … shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers' compensation laws of this state."

In his June 17, 2021 report, qualified medical evaluator internist Richard M. Hyman, M.D. diagnosed applicant with hypertension, also noting that an echocardiogram showed that applicant had "diastolic dysfunction." (June 17, 2021 report at p. 5.) In a supplemental report of July 29, 2021, Dr. Hyman wrote as follows with regard to diastolic dysfunction:

> The second issue relates to diastolic dysfunction which is described as a condition in which abnormalities in mechanical function are present during diastole. More specifically, it indicates a disorder of relaxation of the heart during diastole.
>
> I am asked to indicate whether it represents an abnormality within an otherwise normal healthy heart and to clarify whether the diastolic dysfunction is affected by the patient's high blood pressure.
>
> The diastolic dysfunction is probably secondary to the patient's high blood pressure. As previously pointed out, it ultimately becomes a trier of fact issue as to whether or not this constitutes heart disease or just an early abnormality that is seen in patients with high blood pressure.
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> There certainly is nothing in the AMA Guidelines about using diastolic dysfunction for placement in the Hypertensive Tables. Certainly, when a person has hypertensive wall thickening, they are considered to have hypertensive heart disease but diastolic dysfunction is minor but definite abnormality secondary to hypertension for which the trier of fact is going to have to decide whether this constitutes heart disease or heart injury and makes the hypertension presumptive.

"In order for [an injured worker] to be entitled to the presumption embodied in section 3212, he must first show that his disability can be characterized as 'heart trouble.' As stated in *Baker v. Workmen's Comp. Appeals Bd.* [(1971)] 18 Cal.App.3d 852, 859 [36 Cal.Comp.Cases 431]: 'The presumption is one of occupational causation; it is not a presumption that a disability is attributable to heart trouble." (*Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, 632 [40 Cal.Comp.Cases 578].)

The *Muznik* court reviewed the appellate cases that had found the existence of "heart trouble," and concluded as follows:

> [T]he phrase "heart trouble" assumes a rather expansive meaning. This result is further evidenced by the Legislature's decision not to utilize a medical term or to list or require any specific malady for the presumption of section 3212 to become operative, but rather, to employ a lay term which is not necessarily related to physical deterioration or "disease" at all. As defined in Webster's Dictionary, the term "trouble" when used as a noun covers a wide range of meanings, including distress, affliction, anxiety, annoyance, pain, labor, or exertion. The intent of the authors of the amendment adding the phrase "heart trouble" to section 3212 was no doubt to have the meaning of that phrase encompass any affliction to, or additional exertion of, the heart caused directly by that organ or the system to which it belongs, or to it through interaction with other afflicted areas of the body, which, though not envisioned in 1939, might be produced by the stress and strain of the particular jobs covered by the section. [Citation].

(*Muznik*, 51 Cal.App.3d at p. 635.)

In *Muznik*, the court cautioned that it was not holding that "hypertension, in every instance, constitutes 'heart trouble;' nor do we conclude that disorders in other areas of the body that do not place the heart in a 'troubled' condition, qualify as 'heart trouble.'" (*Muznik*, 51 Cal.App.3d at p. 635, fn. 5.) Nevertheless, the court reversed the WCAB's reliance on a medical opinion stating that the applicant's so-called "essential hypertension" did not constitute "heart trouble." As the *Muznik* court explained, "in applying the term 'heart trouble,' it is permissible to determine whether the interaction of [hypertension] with the heart has proven 'troublesome' to that organ or has required the heart to engage in disabling exertion or labor." (*Muznik*, 51 Cal.App.3d at p. 636.) Thus, in *Muznik*, the court found that the Labor Code section 3212 presumption arose in a case that hypertension contributed to, among other things, ventricular irritability which caused the heart to skip beats. (*Muznik*, 51 Cal.App.3d at p. 637.)

"Expert testimony is necessary 'where the truth is occult and can be found only by resorting to the sciences.' [Citation.]" (*Peter Kiewit Sons v. Ind. Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].) Further development of the record is necessary for determination whether applicant's hypertension with diastolic dysfunction constitutes "heart trouble." In the further proceedings Dr. Hyman should be presented with the expansive definition of heart trouble in the *Muznik* decision and opine whether applicant's condition meets this expansive definition. We express no opinion on the ultimate resolution of this issue.

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395

[62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we amend the WCJ's decision to defer the issue of permanent disability and attorney's fees, and return this matter to the trial level for further development of the record, legal analysis, and decision as outlined above. We note that the WCJ had found that applicant sustained "hypertensive heart disease" despite finding that applicant's injury did not constitute "heart trouble." We have changed the findings of "hypertensive heart disease" to "hypertension with diastolic dysfunction." These findings are without prejudice to a later finding that "hypertension with diastolic dysfunction" constitutes heart trouble.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board the Findings and Award and Orders of July 21, 2022 is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, David Rose, was employed during the period February 1, 1982 through December 17, 2019, having worked for the City of San Bernardino from 1987 through June 30, 2016 and for the County of San Bernardino from 7/1/2016 through 12/17/2019, as a firefighter, occupational group number 490, at County of San Bernardino/City of San Bernardino.

2. The applicant's first date of knowledge with respect to his prostate cancer, sexual dysfunction, and hypertension with diastolic dysfunction was 12/17/2019; The applicant's first date of disability due to his prostate cancer, sexual dysfunction, and hypertension was 12/17/19; based upon the date of knowledge and date of disability, the date of injury for the applicant's prostate cancer, sexual dysfunction, and hypertension with diastolic dysfunction, pursuant to LC 5412, is the period of 12/17/2018-12/17/2019.

3. The employer during the date of injury, the last year of injurious exposure, pursuant to LC 5500.5 is the County of San Bernardino.

4. The Applicant sustained injury arising out of and in the course of his employment with the County of San Bernardino, in the form of prostate

cancer, sexual dysfunction, and hypertension with diastolic dysfunction during the period of 12/17/2018-12/17/2019.

5. Applicant's injuries for both the prostate cancer, and sexual dysfunction are presumptive under Labor Code Sections 3212.1 and 3212.

6. Applicant is entitled to temporary total disability indemnity for the period 12/17/19 to 1/3/2020 at the rate of $1251.39 per week less (excluding) any days worked to be determined by the parties with jurisdiction reserved if there is no agreement as to the calculation.

7. The issue of penalties for late payment of Labor Code Section 4850 fees was deferred by agreement of the parties based on a petition filed by applicant's attorney February 4, 2021.

8. The issues of permanent disability, apportionment, and attorney's fees on permanent disability are deferred, with jurisdiction reserved.

9. Applicant is entitled to further medical treatment to cure and/or be relieved from the effects of the industrial injury.

10. Applicant is entitled to reimbursement for reasonable and necessary medical treatment for costs paid for out-of-state treatment for his prostate cancer to be adjusted by the parties and with court jurisdiction reserved in the event of a dispute.

11. A reasonable attorney fee is found to be 15% any new monies awarded for applicant's periods of temporary total disability. The issue of attorney's fees for applicant's permanent disability or any life pension recovery is deferred, with jurisdiction reserved.

12. The court reviewed defense Exhibit A and Orders this report into evidence as that report resulted from a QME process by Defendant City of San Bernardino in which applicant attorney participated. Exhibit B is excluded as the records were not referred to at trial and not reviewed by the QME doctors in this case.

AWARD

Award is made in favor of David Rose and against County of San Bernardino as follows:

(a) Applicant is entitled to temporary total disability indemnity for the period 12/17/19 to 1/3/2020 payable at the rate of $1251.39 per week less credit with the exclusion of any days worked to be determined by the parties with jurisdiction reserved if there is no agreement as to the calculation.

(b) Further medical treatment to cure and/or be relieved from the effects of the industrial injury.

(c) Payment and/or reimbursement of self-procured medical treatment and liens including out-of-state costs incurred by the applicant to be adjusted by the parties with jurisdiction reserved.

(d) Reasonable attorney fees of 15% of any new monies awarded and remaining unpaid for applicant's period of temporary total disability.

ORDERS

a. Defense Exhibit A is Ordered entered into evidence.

b. Defense Exhibit B is Ordered excluded from evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ **CRAIG SNELLINGS, COMMISSIONER**

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 30, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DAVID ROSE
STRAUSSNER & SHERMAN
BREDFELDT, ODUKOYA & HAN
GOLDMAN, MAGDALIN & KRIKES

DW/oo/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*